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IN THE

Supreme Court of the United States

October Term, 1978.

No. 1790

CLIVE J. DAVIS,

Petitioner,

v.

JOINT BAR ASSOCIATION GRIEVANCE COMMITTEE FOR THE SECOND AND ELEVENTH JUDICIAL DISTRICTS,

Respondent.

Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the Supreme Court, State of New York, Appellate Division, Second Judicial Department.

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PRELIMINARY STATEMENT

The within brief is submitted in opposition to the petition for a Writ of Certiorari to review the order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, entered on December 12, 1977, which struck petitioner's name from the roll of attorneys of the State of New York.

POINT ONE

RETROSPECTIVE APPLICATION OF THE NEW YORK COURT OF APPEALS' DECISION IN *MATTER OF CHU*, 42 N.Y.2d 490, DOES NOT CONSTITUTE AN EX POST FACTO LAW AND BILL OF ATTAINER

New York Judiciary Law Section 90, subdivision 4, provides as follows:

> "4. Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.
>
> Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys."

Prior to March 5, 1940, an attorney was deemed disbarred and his name was stricken from the roll of attorneys upon conviction of any crime statutorily defined as a felony under the laws of New

York, a sister State or of the United States pursuant to the then Judiciary Law, Section 88, subdivision 3 (renumbered Judiciary Law, Section 90, subdivision 4 [1945]).

On March 5, 1940, the New York Court of Appeals in *Matter of Donegan* (283 N.Y. 285) qualified the automatic disbarment statute to the following extent:

> "Strict construction of section 88, subdivision 3 and section 477 of the Judiciary Law requires that the term 'felony' include only those Federal felonies which are also felonies under the laws of this State, and exclude such Federal felonies as are 'cognizable by our laws as a misdemeanor or not at all'" (supra at 292).

On October 13, 1977, the New York Court of Appeals modified the *Donegan* ruling in *Matter of Chu*, stating, in part, that:

> "We conclude that conviction of an attorney for criminal conduct judged by the Congress to be of

> such seriousness and so offensive to the community as to merit punishment as a felony is sufficient ground to invoke automatic disbarment. Whatever may have been the proper evaluation of a felony conviction in courts other than those of our own State in 1940 when Donegan was decided, we now perceive little or no reason for distinguishing between conviction of a federal felony and conviction of a New York State felony as a predicate for professional discipline (supra at 493).

Since the disciplinary proceeding predicated upon petitioner's conviction[1] was not finally adjudicated at the time of the Court of Appeals decision in *Chu*, that ruling was held to apply to petitioner and his name was stricken from the roll of attorneys.

Petitioner's contention, that the application of the *Chu* ruling to him constitutes an ex post facto law and bill of

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[1] 26 U.S.C. 7201 "Attempt to evade or defeat tax."

attainer, is wholly without merit. Moreover, the issues sought to be raised by this petition are virtually identical to those argued by Philip Peltz, whose petition for a Writ of Certiorari was denied by this Court on May 30, 1978 (*Peltz v. Joint Bar Association Grievance Committee*, ___ U.S. ___).

An ex post facto law has been defined as one:

> "which imposes a punishment for an act which was not punishable when it was committed, or imposes additional punishment, or changes the rules of evidence, by which less or different testimony is sufficient to convict." (C.J.S. Constitutional Law §435 et seq.)

Further, the constitutional limitation as to ex post facto laws has long been held by this Court to apply solely to criminal statutes (*Baltimore & S.R. Co. v. Nesbit*, 51 U.S. 395, see also, *Mahler v. Eby*, 264 U.S. 32). Disciplinary

proceedings have consistently been held to be civil in nature (*Matter of Zuckerman*, 20 N.Y.2d 430, 438 [1967], cert. den. 390 U.S. 925 [1968]), and are not considered to be criminal (*Matter of Unger*, 27 A.D.2d 925 [1st Dept. mem. 1967], cert. den. 389 U.S. 1007 [1967]). Therefore, petitioner's reliance upon *Beazell v. Ohio* (269 U.S. 167), namely, that *Chu* "has significantly increased the punishment for this particular transgression," is clearly misplaced.

As recently as April 5, 1977, the New York Court of Appeals confirmed the civil nature of these proceedings and reaffirmed the words of Judge Cardozo:

> "We hold that disciplinary sanctions are not punishment within the meaning of section 50.10. As Judge CARDOZO explained in *Matter of Rouss* (221 N.Y. 81, pp 84-85): 'Membership in the bar is a privilege burdened with conditions. A fair private and professional character is one of them. Compliance with that condition is essential at the moment of admission; but it is equally essential afterwards [citations omitted].

Whenever the condition is broken, the privilege is lost. To refuse admission to an unworthy applicant is not to punish him for past offenses. The examination into character, like the examination into learning is merely a test of fitness. To strike the unworthy lawyer from the roll is not to add to the pains and penalties of crime.' Whether the practice of law is termed a privilege (*Matter of Rouss, supra*) or a right (*Matter of Levy*, 37 N.Y.2d 279, 282) disciplinary sanctions imposed for misconduct are not criminal penalties under the statute." (*Matter of Anonymous*, 41 N.Y.2d 506, 508.)

Petitioner's argument that the *Chu* ruling should not be applied retroactively in petitioner's case further ignores the fact that it has long been the law that new or revised principles of decisional law apply to all cases not finally adjudicated and in which litigation is pending (*People v. Morales*, 37 N.Y.2d 262). In the *Morales* case, the New York Court of Appeals, relying upon authority of this Court, discussed the common-law concept of retroactivity as follows:

> "The concept of 'retroactivity' is not new. It has an ancient tradition, under which Judges were not deemed to 'make law' as such, but to 'pronounce the law' which, even if it had previously been enunciated erroneously, was conceived of as having always been there, waiting just to be correctly stated. (Mishkin, The High Court, the Great Writ, and the Due Process of Time and Law, 79 Harv L Rev 56, 58.) Consequently, since the 'correct' law was looked upon as having always been the same, a case decided on direct appeal always received the benefit, or detriment, of any decisional law 'pronounced' before its judgment became final. (See *United States v. Schooner Peggy*, 1 Cranch [5 U.S.] 103, 110.) However, once a judgment had become final, it was not affected by law freshly 'pronounced' thereafter. (1 Blackstone's Commentaries 69 [15th ed.]; 1 Black, Judgments [2d ed.], §§245, 246.)" (Supra at p. 268.)

Similarly, rulings of this Court in *Mullany v. Wilbur*, 421 U.S. 684 (see *People v. Davis*, 49 A.D.2d 437) and *Morrissey v. Brewer*, 408 U.S. 471 (see *People Ex Rel Gambino v. Warden*, 43 A.D.2d 400) have been applied retroactively.

Indeed the law with respect to retroactivity is as stated by this Court in *Linkletter v. Walker*, 381 U.S. 618, that, "Under our cases it appears (1) that a change in law will be given effect while a case is on direct review, *Schooner Peggy*, supra..." and "...no distinction (is) drawn between civil and criminal litigation..." (supra at 627).

POINT TWO

RETROSPECTIVE APPLICATION OF THE *CHU* DECISION DOES NOT CONSTITUTE A VIOLATION OF DUE PROCESS OF LAW

Petitioner's contention that application of the *Chu* decision to his case constitutes a violation of Due Process of Law, where petitioner had been accorded a hearing and the Appellate Division's referee had rendered a report, since--argues petitioner--it "shock[s] the sense of fair play," is patently absurd.

Surely petitioner does not suggest that the United States Constitution is violated by any State action which could arguably be construed to invoke so broad and generic an emotional response.

The fact is that the constitutionality of the automatic disbarment provision of Judiciary Law, Section 90 (i.e., subdivision 4), has been repeatedly upheld by

the New York Courts (*Matter of Abrams*, 38 A.D.2d 334, see also: *Matter of Glucksman*, 57 A.D.2d 205). In *Abrams*, recognizing that conviction for a felony by a member of the bar has historically been deemed conclusive of his unfitness to practice law (see: *Matter of Keogh*, 25 A.D.2d 499, mod on other grounds 17 N.Y.2d 479), the Court there specifically held that:

> "Although subdivision 4 of section 90 provides for automatic disbarment upon conviction (*Matter of Barash*, 20 N.Y.2d 154 [1967]) respondent's constitutional guarantee of due process is safeguarded by his jury trial and appellate review" (supra at 336).

Moreover, this Court's denial of a writ of certiorari in the *Peltz* case (supra) --wherein the petitioner there had likewise had a plenary hearing and the referee's report had been filed--constitutes an implicit rejection of petitioner's "due process" argument.

CONCLUSION

The petition for a Writ of Certiorari should be denied.

Dated: Brooklyn, New York
July 7, 1978

Respectfully submitted,

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Attorney for Respondent